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No. 927

In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK, *Petitioner*

vs.

UNITED STATES OF AMERICA

SUPPLEMENT TO PETITION FOR CERTIORARI AND REPLY TO BRIEF IN OPPOSITION.

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Seattle 1, Washington

FRAYN PRINTING COMPANY

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This Supplement to the Petition for Certiorari is filed pursuant to Rule 24 (4) of the Rules of this Court.

Its purpose is to discuss briefly two cases which have been decided by this Court since the date of filing the Petition herein. The cases are *Beck v. Washington* and *Hutcheson v. United States,* both decided on May 14, 1962. (October Term, 1961, No. 40 and No. 46).

While preparing this Supplement, Counsel received the Brief of the United States in Opposition to the Petition. A Reply to this Brief will be included herein.

SUPPLEMENT TO PETITION

The basic and significant distinction between *Beck v. Washington* and the present case is this:

Beck v. Washington related to the impact of FEDERAL legislative proceedings upon STATE judicial proceedings.

But the present case relates to the impact of FEDERAL legislative proceedings upon FEDERAL judicial proceedings.

In *Beck v. Washington,* the scope of review was limited to a determination of whether the proceedings of the State court conformed to standards imposed by the Fourteenth Amendment. But in the present case Federal judicial proceedings are involved and the required standards are on a higher plane. The scope of review and the standards applicable in this case are defined in *McNabb v. United States*, 318 U.S. 332 (1943) as follows (p. 340):

> "In the view we take of the case, however, it becomes unnecessary to reach the constitutional issue pressed upon us. For, while the power of this court to undue convictions in state courts is limited to the enforcement of those 'fundamental principals of liberty and justice,' Hebert vs. Louisiana, 272 U.S. 312, 316, 71 Law. Ed. 270, 272, 47 Supreme Court 103, 48 A.L.R. 1102, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duties of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this court of State action expressing its notion of what

will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a State in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts." See also, *Gruenwald v. United States*, 353 U.S. 391, 424 (1957).

It may be that when Federal proceedings threaten to affect State proceedings, the citizen must accept the situation as merely a stroke of hard luck. See *Hale v. Henkel*, 201 U.S. 43 (1906). But there is no justification for the application of this view where the Legislative Branch of the United States deliberately sets out to prejudice and degrade a citizen against whom criminal proceedings are simultaneously being conducted within the Judicial Branch of the United States.

We do not contend that the United States is *ipso facto* barred from conducting simultaneous legislative and judicial proceedings against a citizen. Our contention is that the urgency and nature of the legislative proceedings must be measured against the requirement that fair judicial proceedings be preserved, and that both the Legislative and Judicial Branches of the United States must conduct their proceedings by methods designed, insofar as possible, to preserve fundamental principles of justice.

That was not done in the present case. The legislative inquiry went far beyond the scope necessary for the proposal and enactment of legislation; and the inquiry was conducted publicly (a) while Petitioner was the subject of a grand jury investiga-

tion; (b) after the return of an Indictment; (c) while a second charge against the petitioner was being considered by a grand jury; (d) after the return of a second Indictment and prior to trial. (A chronology of these events and the facts summarized hereinafter is set forth in detail in the Appendix to the Petition, commencing at Page 1A).

At the time of petitioner's first appearance before the Senate Committee, the Committee was advised that he was the subject of a criminal investigation. His assertions of privilege under the Fifth Amendment were not honored. Instead, he was required repeatedly to assert the privilege and to absorb the public contempt for doing so; and, indeed, his right to assert the privilege was publicly challenged and criticized by the Senate Committee. At the time of his second appearance before the Committee, the Committee was advised that he had been indicted and a request was made that his testimony be postponed. This request was denied and petitioner was again required repeatedly to assert the privilege of the Fifth Amendment and was publicly accused by the Committee of theft and other misconduct. Thereafter the second Indictment was returned by the grand jury. Subsequently the Committee issued a report which included "Findings" that petitioner was guilty of theft and other misconduct. The Chairman of the Committee also summarized these "Findings" in a magazine article with widespread national circulation.

It was the theory of the government that most, if not all, of petitioner's unreported income consisted of funds acquired by theft. (See Government Brief, Court of Appeals, p. 27-62). The inquiry of the Senate Committee was precisely related to the sub-

ject of the indictments and the trial testimony. Of the eleven "Findings" of the Senate Committee, at least nine were the subjects of testimony at the trial; and witnesses (at least 12) who testified before the Committee were called to repeat portions of their testimony at the trial; and many exhibits introduced "in evidence" in the Committee proceedings were also admitted in evidence at the trial. (The "Findings" of the Committee are at Page 84-86 of Senate Report No. 1417. A list of some of the witnesses before the committee is set forth in Parts 3, 4, 7 and 10 of the Committee Hearings. A list of the witnesses at the trial is set forth in Appendix C of Appelant's opening Brief in the Court of Appeals. Further details which demonstrate the similarity between the Hearings and the trial, both as to subject matter and evidence, are set forth hereinafter at page 12-13).

While the legislative inquiry was being conducted in high fury, the grand jury proceedings continued without inquiry as to whether its members were affected by the unprecedented hostile publicity and without cautionary instructions or advice from the Court. (See Appelant's Brief in the Court of Appeals, Page 50-53).

Against this background it is hardly surprising that the grand jury indicted petitioner on a charge of filing a false 990 Return for a year in which no such Return was even filed! The charge was, of course, dismissed at the commencement of the trial. (See Transcript of Testimony, Page 4574). Nor is it surprising, under the circumstances, that the trial jury convicted petitioner on two charges relating to 990 Returns despite the fact that petitioner had nothing whatsoever to do with preparing or filing

the Returns. (The failure of proof on the 990 Counts is discussed briefly at p. 17 hereinafter).

By its holding in *Beck v. Washington* this Court has now established that one accused in state proceedings must bear the risk that the federal government may engage in conduct which endangers the fairness of the state proceedings. In assuming this risk, and to guard against this danger, the accused must be prepared to prove as a "demonstrable reality" that the federal proceedings have in fact affected the state proceedings.

The Court of Appeals in the present case also adopted the same theory, declaring that the burden was upon the accused to make "a specific showing of prejudice . . ." (298 F. 2d 622, 627).[1]

There is no justification for the adoption of this rule in the present case. To require one accused by our government to bear the risk that the *same* government, in non-judicial proceedings, will intentionally endanger his right to fair procedures would violate the most minimal standards of due process and procedural fairness as well as the basic philosophy of separation of powers. Where, as here, our government, acting through the Senate, deliberately attacks a citizen against whom criminal proceedings are pending, and carries on its attack in a manner calculated to endanger the fairness of the proceedings, it is not asking too much to require the government to assume the burden of proving that the rights of the accused have not been prejudiced.

In cases involving a lesser degree of potential prejudice than that which is manifest in the present

[1] This rule is in conflict with the decision of the Court of Appeals for the First Circuit in *Delaney v. United States*, 199 F. 2d 107.

case, this Court and other Federal Courts have not required the accused to assume the burden of demonstrating bias on the part of the jurors. Whatever the State rule is to be, the Federal Courts have repeatedly held that no specific or direct showing of jury prejudice is required where the surrounding circumstances so clearly demonstrate a danger of prejudice. See *Marshall v. United States*, 360 U.S. 310 (1960); *Griffin v. United States*, 295 Fed. 437 (3rd. Cir. 1924); *United States v. Marrin*, 159 Fed. 767 (D.C. Penn. 1908). *To deny the application of these decisions to a case in which the danger is created by the United States itself would be to abandon all justice.*

Most of the cases on this subject relate to the possible effect of hostile publicity upon the minds of *trial jurors*. The rule can be no different in a case involving *grand jurors*. Whatever may be the rule in state procedure, the federal rule is that the citizen is entitled to a fair and unbiased grand jury, or at least a grand jury which has not been subjected to prejudicial influences created by the government. *Hoffman v. United States*, 341 U.S. 479, 489 (1951); *Costello v. United States*, 350 U.S. 359, 369 (1956). Petitioner's contention is that the United States should not be permitted to create potential prejudice and then subject an accused to the burden of demonstrating actual prejudice, while preventing the accused from doing so by resort to procedural rules which deny to the accused any opportunity to sustain this burden. Petitioner was not present at the impanelment of the Grand Jury. (Cf. Rule 6(b), which provides that a defendant who has been held to answer may challenge grand jurors.) Petitioner's motion for production of the

Grand Jury transcript was denied (R. 845) An *in camera* examination of the transcript by a trial court does not provide a method for measuring the prejudice of grand jurors. Among other deficiencies in this procedure, it denies the accused the benefit of counsel with respect to a vital procedural step.

In the case of *United States v. Carper*, 116 Fed. Sup. 817 (Dist. Col. 1941) this problem was carefully considered. In that case the court dismissed an indictment on the ground that unauthorized persons had appeared before the grand jury, even though no prejudice was shown, and held at p. 820:

> "Secondly, in many cases the defendant would have an almost impossible task trying to prove actual prejudice to himself. It seems to this court that at most the defendant need show only probable prejudice to the grand jury system by this violation."

The same rule was followed by the First Circuit in *Delaney v. United States*, 199 Fed. (2d) 107, where a new trial was granted because of hostile publicity engendered by a congressional committee. The defendant there made no "specific showing of prejudice", and undoubtedly could not have done so. The *Delaney case* involved only a trial jury issue and not a grand jury issue, but the present case involves both. In all other respects the two cases are closely similar, and the decisions of the two courts of appeal are in direct conflict.

It is submitted that the crucial question in the present case comes to this: When criminal proceedings brought by the United States are pending against a citizen, and where such proceedings include secret grand jury sessions and secret deliberations on the part of jurors whose subconscious influences cannot be measured, and when the United States simultaneously denounces and

asserts the guilt of that citizen in public congressional proceedings, which party should bear the risk of the damage necessarily inflicted upon the Federal judicial system? It is submitted that this question is of great importance and fully justifies the granting of certiorari herein.

Hutcheson v. United States also involves the conflict between legislative investigations and criminal prosecutions. In that case, however, Hutcheson contended that the inquiry by the Senate Committee was *per se* unconstitutional and, therefore, could not sustain a conviction for refusing to answer. The Court did not consider whether the interrogation of Hutcheson had affected proceedings in an Indiana prosecution of Hutcheson, since that case was not before the Court.

The principles announced in the various opinions in *Hutcheson* demonstrate the compelling need for certiorari in the present case. Here, a large portion of the Senate hearings were, in fact, a preview of the trial. The Senate Committee did not "honor" petitioner's assertion of his constitutional privilege, but instead challenged his right to assert it and condemned him for doing so. In this case the inquiry of petitioner by the Senate was concurrent with the grand jury Indictments.

In the present case the Senate did not accommodate the public interest in legitimate legislative inquiry with the public interest in securing a fair trial. And any fair examination of the Senate proceedings will forcefully demonstrate that a primary purpose of the Committee was to aid in the prosecution and conviction of the petitioner.[2]

[2] The Trial Court denied petitioner's motion for the right to interrogate the Chairman and Counsel of the Senate Committee. R.291.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief of the United States in opposition to the Petition will be referred to herein by the abbreviation "Br. Op."

1) The government states that it will not seek to retry the evasion counts "in the event that the sentence under the 990 counts becomes final." (Br. Op. p. 7) (The government makes no offer to dismiss the conspiracy charge against petitioner. R. 440, 447). Whatever may be the reason for this offer, it certainly provides no grounds for denying the Petition herein.

2) The government states that on April 9, 1958 the Court granted a continuance at the request of petitioner (Br. Op. p. 9). It should be added that on the same date, the government also sought a continuance. This was shortly after the issuance of the Interim Report of the Senate Committee (Report No. 1417)[1] and petitioner frankly stated to the Court that his motion for continuance was based upon the issuance of this report and the attendant

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Query whether this decision is binding upon the Attorney General or upon a subsequent Attorney General. One reason for the decision against retrial may be that the government, having determined to convict petitioner for embezzlement, will be unable tactically in a subsequent trial to take the position that the unreported funds were considered by petitioner and by the union entities to be compensation for services.

[1] One of the "Findings" in the Senate Report was: "Dave Beck took, not borrowed, more than $370,000 in union funds from the Western Conference of Teamsters, Joint Council No. 28 Building Fund and the Public Relations Division of Joint Council No. 2." The three entities referred to in this "Finding" were the principal sources of petitioner's alleged unreported income and there was considerable testimony to the effect that the sum which petitioner owed to the union entities was exactly $370,000.

publicity (R. 224-225). The Court acknowledged that there had been publicity concerning this subject. Thus (R. 224-225):

> "*Mr. Burdell*: My position, as the Court, I believe, knows, is that under the present circumstances it is extremely unlikely and probably extremely difficult, regardless of the attempts of the Court, to obtain a fair and impartial jury in view of the circumstances that are even going on at the present time in the East, and particularly in view of some recent interim reports which have been issued by the Senate Committee and which have received rather prominent publicity throughout the area both by way of newspapers and television reports.
>
> In addition to that, I filed a motion this morning. . . .
>
> *The Court*: In that connection you are referring to, I take it, the material shown in the attachments to your motion pertaining to the interim report of the Senate so-called Rackets Committee?
>
> *Mr. Burdell*: Yes, I am.
>
> *The Court*: And the attendant publicity during the last several weeks?"

The reason given by the government for seeking the continuance was that the issue of taxability of embezzled funds created a substantial legal question "that might be brought to the attention of the Court in advance of trial for the purpose of expediting the trial proceeding"! (R. 226) A few days earlier the Government had *resisted* an attempt by petitioner to raise this legal question (R. 203, 208-09). Of course the Government never made any attempt whatsoever to expedite the trial by attempting to solve this problem prior to the trial or by attempting, at the trial, to draw any dis-

tinction between funds which were allegedly embezzled and other funds which the petitioner had received.

In addition to the motion for continuance, petitioner also filed, on August 8, 1958, a motion for permission to interrogate, either orally or upon written interrogatories, the Chairman, Chief Counsel and Clerk of the United States Senate Committee. (R. 325) In seeking to do so, petitioner filed an affidavit giving the following reasons for the motion (R. 236-38):

"That defendant has requested a pre-trial hearing upon said challenge and motion for the purpose of presenting testimony and evidence to establish the foregoing facts, and to establish particularly that the aforesaid atmosphere of hostility against him was created and has been maintained by the said Committee willfully and with full knowledge that the indictments herein were pending or had been returned. Defendant proposes to establish further that in conducting its public hearings before, during and after the sessions of the said grand juries, the said Committee relied upon and revealed evidence which had been gathered over a period of years by the Internal Revenue Service in preparation for the commencement of the prosecution herein; that the witnesses called by said Committee to testify at public hearings which were nationally televised and widely publicized by every other means of mass communication, were substantially the same witnesses who subsequently appeared before the said grand juries and who will be called by the plaintiff to testify at the trial herein; that the said Committee and its representatives have concluded and repeatedly announced, orally and in

writing, that defendant, during the years covered by the indictments herein, misappropriated at least $370,000.00 of the funds of labor organizations of which he was an official, and that the funds so described are the same funds which go to make up substantially all of the government's net worth evidence herein; that on at least one occasion the Chairman or Chief Counsel of said Committee has attempted to influence the decisions of this court by transmitting a telegram concerning this defendant to the Judge thereof; and that prior to the commencement of the said Senate hearings, and before each of this defendant's two appearances as a witness before the Committee, the Committee received notice from this defendant and his said counsel that the grand jury proceedings herein were pending, that the monies involved in the Committee's inquiry were the same that would be involved in any income tax prosecution, and that the Committee hearings should be suspended until the trial of these cases, and that if they were not so suspended, defendant would be required to claim his privilege against self-incrimination as to any question relevant to the issues raised by the indictment herein.

That at the present time, and continuously for the past several months, the said Committee is conducting and has conducted a continuing series of public hearings concerning the financial affairs and other activities of the International Brotherhood of Teamsters and of its affiliated unions, and of James R. Hoffa, its president; that said hearings are highly publicized and of an inflammatory nature, and are prejudicial to this defendant who, in the public mind, is allied closely with the said unions and with the said James R. Hoffa. Affiant

is informed and believes, and therefore avers, that said Committee will continue to hold such hearings until and during the trial of these cases if trial is begun in October, 1958."

The aforesaid affidavit was uncontroverted, but the motion was denied (R. 313).

4) In its consideration of the proceedings at which the trial jury was selected, the Government refers to the fact that prospective juror Hamilton stated that he held an unfavorable opinion of petitioner because the latter had invoked the Fifth Amendment at the Senate Committee hearings. (Br. Op. p. 12) It has been Petitioner's position that this incident demonstrates that the conduct of the Senate Committee in requiring petitioner to assert the privilege of the Fifth Amendment was still in the minds of some of the prospective jurors; but if each of them had perchance forgotten this course of conduct, it was brought to their attention by the statements of prospective juror Hamilton. Moreover, this is not a case where, as in *Grunewald v. United States*, 353 U.S. 391 (1957) the defendant was shown to have asserted the privilege only once. In view of the fact that the Senate Committee required petitioner to repeatedly assert the Fifth Amendment to such an extent that the number of times he did so became a subject of comment and newspaper headlines (see, for example, p. 24A of the Appendix to the Petition herein), the only reasonable conclusion is that the Hamilton incident reminded the jurors that petitioner had asserted the privilege many times. The government apparently attaches significance to the fact that the

Trial Court admonished the jurors in this incident. But in *Beck v. Washington,* the Court observed that an admonition concerning the effect of the privilege "might well have added fuel to the flames . . ." (Slip Op. p. 7). Here, as in *Grunewald* (353 U.S. 424)

> ". . . the danger that the jury made impermissible use of [the statement concerning Petitioner's assertion of the privilege] by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cr. *McNabb v. United States,* 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608."

5) *The Grand Jury Issue.* The position of the government on this vital issue is that it knows of no authority to support the argument that an indictment is subject to attack because "the grand jurors were exposed to a flow of publicity, unfavorable to the defendant." (Br. Op. p. 21) This ignores the vital and significant fact that the unfavorable publicity was created by the same sover-

Immediately following the outburst of prospective juror Hamilton, petitioner moved for a mistrial as follows:

> "I want to move at this time for a mistrial on the ground that this last juror, Mr. Hamilton . . . stated in the presence of the other jurors that he had formed an unfavorable impression of Mr. Beck because of Mr. Beck's exercise of Mr. Beck's privilege under the Fifth Amendment in the course of the Congressional hearings. . . . It suggests to the other jurors that there was something wrong with asserting that privilege, and it is particularly significant in this case, because Mr. Hamilton is a retired Brigadier-General and Chairman of the Republican Party, and apparently a man of some stature. On that ground we move for a mistrial."

This motion was denied by the Court (R. 575).

eign which had petitioner under investigation and indictment. A grand jury in our country will never be a shield between the prosecutor and the accused (*Hoffman v. United States;* 341 U.S. 479, 485) if the government itself may intentionally make the citizen the target of accusations relating to the specific acts which a grand jury is simultaneously considering.

It is also asserted that the "prophylactic rules" of trial proceedings are inapplicable to grand jury proceedings and that the racial exclusion cases are inapplicable (Br. Op. p. 22). If this means that a citizen is not entitled to a fair and impartial grand jury, the argument is in conflict with previous decisions of this Court. Even if we assume that the rules relating to trial juries do not apply to grand juries, it does not follow that the government can take affirmative and positive steps calculated to interfere with the impartial deliberations of grand juries. On the contrary, since grand juries are secret and afford an accused little or no opportunity for considering the procedures and submitting them to the courts for review, it should be the duty of the government, and all branches thereof, to carefully avoid all possibility of interference with the grand jury function.

As to the racial exclusion cases—whatever may be the rationale of these cases—the fundamental objective is to provide fair and impartial procedures during a criminal investigation at the grand jury level. That is all that is sought in the present case.

The government adopts the position taken by the Court of Appeals, that the accused must make a "specific showing of prejudice . . . to make erroneous the action of the trial judge in refusing to dis-

miss the indictment." (298 F(2d) 622, 627; Br. Op. p. 23). Here, we think, the government comes to grips with the fundamental problem involved in this case. Who must bear the risk of prejudice, and the burden of demonstrating such prejudice, when the danger is created by the government itself? It is our position that the burden in this narrow type of case should not be upon the accused or, if it is upon the accused, that it has been fully satisfied by the showing of intentional conduct and resultant publicity which took place in this case. Decisions and arguments which relate to accidental publicity do not control the peculiar problem presented here.

6) *The 990 Counts.* It is not the function of this Court to weigh evidence. But we are convinced that any fair appraisal of the evidence in this case will show conclusively that there was no evidence whatsoever of any act on the part of petitioner relating in any way to the preparation or filing of the 1950 and 1952-990 returns, and that the verdict of the jury resulted solely from the background of hostile publicity created by the Senate Committee and from the fact that the government was determined to prove that petitioner was guilty of embezzlement as well as tax evasion. Under these circumstances, this Court will act. *Thompson v. Louisville,* 362 U.S. 199 (1960).

In its brief in the Court of Appeals (p. 178-185) the government failed to refer the Court or counsel to any page of the record, or to any exhibit, which was claimed to support the verdict on the 990 counts. This fact was brought to the attention of the government in petitioner's reply brief (p. 40). Nevertheless, in the supplemental briefs which were filed subsequent to the decision in *James v. United*

States, 366 U.S. 213, the government again failed to designate any testimony or exhibits in support of petitioner's conviction (and sentence of conviction for five years) on the 990 counts. Finally, in its brief in opposition to the petition herein, the government does refer to some testimony and exhibits, but a fair analysis of all of the evidence referred to by the government forcefully demonstrates that there was really no evidence in support of these counts and that it would be a frightful violation of due process for this Court to permit these convictions to stand, whether or not the government decides to retry the tax evasion counts.

We have been unable to find any decision which could conceivably be cited as authority for affirmance of these counts. The case of *United States v. Brill*, 270 F.(2d) 525 (3rd Cir. 1959) provides not the slightest assistance to the government. The case which is most similar to the facts involved in the present case is *United States v. Pechenik*, 236 F.(2d) 844 (3rd Cir. 1956) where a conviction was reversed.

The 990 returns were prepared by Donald M. McDonald and were delivered by him to Frank Brewster and signed only by Brewster (Tr. 4591, 4762). McDonald, a government witness, testified flatly that petitioner did not have anything to do with preparing or signing either of these returns (Tr. 4828). The government's attempt to torture other testimony and evidence into some sort of a circumstantial case against petitioner is based purely upon assumption and speculation.

The falsity of the 990 counts lay in the fact that checks written on the account of Joint Council No. 28 Building Association, payable to John Lindsay,

a contractor, were all treated by McDonald as Building Association expenses. Some of the checks were in fact payments to Lindsay for construction work done for petitioner, rather than for the Building Association. This was a large portion of the money which the government claimed to have been embezzled, and which petitioner's counsel claimed to have been borrowed, and which, according to the Court of Appeals, may have been compensation for services (295 F(2d) 630).

Since the returns were prepared by McDonald and signed by Brewster, the question becomes: did petitioner do *anything* to cause McDonald to make the improper entries on the returns?

The appropriate starting point in making this inquiry is to be found in the government's brief. The government asserts (Br. Op. p. 17):

> "McDonald did not know, at the time he entered the checks to Lindsay as being for union construction, that a substantial number of these payments were in fact for petitioner's personal benefit. Since he knew that Lindsay was the union's general contractor, *McDonald assumed that the checks were in payment of current or completed union construction work and entered them as such in the union records and on the Form 990 returns.*" (Emphasis supplied)

The government then says that petitioner did not advise McDonald that the payments to Lindsay were for anything other than union construction (Br. Op. p. 18).

The unfairness of this argument can be readily demonstrated:

(a) McDonald *did know* that Lindsay was performing construction work both for petitioner per-

sonally and for the Building Association (Tr. 4780-81, 4783-84).

(b) Petitioner was not McDonald's superior and did not supervise his work (Tr. 4531, 4484, 4746, 5093; 4372-4373, 4409-4410).

(c) McDonald *never* asked petitioner any questions about how to prepare the returns (Tr. 5369).

(d) Petitioner never saw the books of the Building Association and had no knowledge concerning the method used by McDonald in entering the payments to Lindsay (Tr. 4745).

(e) Petitioner never told McDonald how to keep the books of the Building Association (Tr. 4745) and McDonald sought no instructions (Tr. 4356, 4360, 4372-4373, 4409-4410).

(f) McDonald *never* made any inquiry of petitioner with respect to the payments to Lindsay (Tr. 4782-4790).

(g) McDonald obtained his information concerning Lindsay's charges and the work which Lindsay was performing from Lindsay himself. (Tr. 4556-4558, 4564, 4585).

(h) Lindsay segregated the costs for the work he did for petitioner from that which he did for the Building Association, and petitioner depended upon Lindsay to accurately separate these costs (Tr. 5369-5371, 5458-60).

(i) Petitioner never gave Lindsay instructions to keep incorrect or improper records (Tr. 5369).

(j) Petitioner never gave Lindsay instructions to charge personal construction costs to the Building Association (Tr. 5369).

(k) Petitioner never gave Lindsay instructions

to keep incorrect accounts or records (Tr. 5369).

(l) There is not the slightest evidence that the 1950 or 1952 return came to the attention of the petitioner, either physically or mentally.

(m) Although from time to time, petitioner as well as others, did give McDonald instructions to write checks to Lindsay, there is no evidence indicating which checks were written at the instructions of petitioner, or during what year they were written, or what construction work they related to, or whether these particular checks were improperly entered by McDonald on the 990 returns.

(n) Knowing that proper records were being kept, appellant, had he desired or attempted to falsify, would have had to instruct someone to conceal or change or falsify these records. There is not one word of testimony that he did so.

From the above testimony, which was explicit and uncontradicted, it is clear that petitioner had no reason to know that McDonald prepared either the 1950 or 1952 returns incorrectly. On the contrary, knowing that McDonald was obtaining his information from Lindsay and that Lindsay was keeping proper records, petitioner would have concluded (assuming the question occurred to him) that McDonald and Lindsay were handling the matter correctly. Under these circumstances, how can the government ask any court to permit a conviction to stand because petitioner did not "advise McDonald, or lead him to believe, that payments to Lindsay were for anything but union construction." (Br. Op. p. 18)

The other contentions made by the government are equally unsound, and in most cases based upon

an inaccurate interpretation of the testimony.* Thus:

(a) The government's assertion that checks issued to Lindsay were written upon instructions received "directly or indirectly" (Br. Op. p. 17) is meaningless. The fact is that McDonald wrote checks to Lindsay upon the instructions of at least six persons, including Lindsay himself, and various superiors of McDonald (Tr. 4755, 4782, 4570). There is no testimony that petitioner gave any instructions to these other people concerning the instructions which they in turn were to give McDonald, or concerning the manner in which the checks were to be entered on the books of the Building Association.

(b) The fact that petitioner gave McDonald instructions concerning the transfer of accounts (Br. Op. p. 17) has not the slightest relevancy to the preparation of the 990 returns. This fact, if it be a fact, is not a circumstance which in any way indicates that petitioner saw or had anything to do with the 990 returns, nor is this a fact which would cause the 990 returns to be incorrectly made.

(c) The monthly financial statements which petitioner saw (Br. Op. p. 18) were not prepared in a manner which would indicate to petitioner that McDonald was making improper entries on the 990 returns (Tr. 4485-4491; Exs. 804-A, 804-B, 804-C, 805). The key to the erroneous returns was not the status of the bank account of the Building Association, but the record segregation which was being kept by Lindsay (Tr. 4556-58, 5371, 5458-60).

* None of the attorneys who participated in the preparation of the government's brief in opposition was present at the trial.

There is no evidence to show whether Lindsay kept these records incorrectly, or whether McDonald received proper information from Lindsay and then made improper entries. In either event, there is not the slightest evidence that the fault lay in any instructions from petitioner to Lindsay or from petitioner to McDonald.

(d) With respect to Exhibit 805 (Br. Op. p 18) the government should have made it clear that Joint Council No. 28 is a different and separate entity from Joint Council No. 28 Building Association. Thus the work sheet, whatever it contained, had nothing to do with the 990 counts involved here.

(e) With reference to the delivery of the 1951 return to petitioner's office, McDonald specifically testified that he did not deliver it to petitioner, and there is not the slightest circumstance which indicates that it would have come to the attention of petitioner. In fact, the evidence is to the contrary (Tr. 4569-4572, 6882-6883). In any event this return was not filed and the charge relating to it was dismissed. Moreover, what conceivable relevancy could it have to the 1950 return?

(f) Miss Agapoff, who preceded McDonald as the bookkeeper for the Building Association, did receive some instructions from petitioner (Br. Op. p. 16); but she did not testify that petitioner at any time gave her any instructions to make any improper entries either on the books of the Building

Even if it be assumed that appellant or the Building Association did not file a return for the year 1951, it would not support the convictions for the years 1950 and 1952. Where fraud is charged for certain years, evidence of *failure to file* a return in another year does not consittute any proof of fraud for the years in question. See *United States v. Long*, 257 F(2d) 340 (3rd Cir. 1958).

Association or upon the 990 returns (Tr. 5496-5537). Her identification of certain check stubs drawn upon Joint Council No. 28 Legislative Fund is, of course, hopelessly irrelevant (Br. Op. 16) because there is no indication that there is anything improper about the stubs, and in any event, the stubs had nothing to do with the Building Association.

(g) Although Miss Agapoff may have showed McDonald how to keep the books (Br. Op. p. 16) there is no evidence whatsoever that she instructed McDonald to keep the records improperly or, if she did so, that petitioner knew it, or that she had been keeping the records in a manner which would have caused McDonald to keep them improperly, or, if she had been doing so, that petitioner knew it.

(h) The only 990 returns which petitioner ever saw or signed were the 1942 and 1945 returns. If, as the government claims, the 1945 return was false (query whether it was knowingly false), it is certainly too remote in time to constitute evidence that petitioner performed any act with respect to either the 1950 or 1952 returns. Petitioner's objection to the 1945 return should have been sustained (Tr. 5514-5515).

(i) The fact that petitioner signed the 990 returns for other entities (Br. Op. p. 15) is certainly not the slightest evidence that he had any knowledge of the falsity of the Building Association returns. There is no contention that the returns of the other entities were false.

In order to support the verdict in this case, the government would have to rely upon things which the petitioner *did not do* rather than upon acts which petitioner did in fact perform. The evidence affirmatively indicates that petitioner had reason

to believe that Lindsay and McDonald were keeping proper records, and under these circumstances there is not any evidence of knowledge on the part of petitioner that false entries were being made.

It is respectfuly submitted that the petition for certiorari should be granted.

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